In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 433

W. D. LYONS,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF ON BEHALF ON RESPONDENT

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May, 1944.

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STATEMENT

As stated to the Court at the time this case came up for argument on April 26, 1944, petitioner's brief had been filed on April 7, 1944, but there had been no effort to comply with the rule of this Court by service of a copy of such brief upon the attorneys for the state, and we knew ab-

solutely nothing of the filing of same until the writer learned thereof at the clerk's office after arrival in Washington on April 25 and shortly before the matter was due to be reached for argument. Incidentally we notice that in this brief counsel were able to cite the pages of the printed record; whereas, we received no copy of such record until April 10th. For reasons partly stated to the Court, we were unable properly to prepare any brief until we had received the brief of petitioner. This fact is further verified by comparison of petitioner's brief with the stipulation which appears in the record beginning on page 355, and which had been entered into at the request of the clerk and counsel for petitioner in order to abbreviate the record. By said stipulation it is expressly agreed (R. 356):

> "that the only issue to be presented by petitioner for consideration by the court shall be that of the admissibility in evidence of the confessions of petitioner introduced by the State of Oklahoma and admitted by the trial court, and whether such admission was a denial to petitioner of equal protection and a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States."

Yet under the discussion of alleged error II, beginning on page 24 of the brief, counsel make contentions beyond the terms of the stipulation.

Beginning with the last paragraph on page 11 of petitioner's brief, counsel make some statements with reference to the "only evidence produced by the State" with the exception of the confession. A rather interesting

answer is found in the briet of the American Civil Liberties Union, which brief, of course, was filed in the interest of the petitioner. On page 10 of said brief counsel state:

> "The crime was committed with a shotgun not belonging to defendant, but to one Sammie Green."

It is quite evident that counsel for the American Civil Liberties Union were fully convinced that the gun introduced in evidence was the one with which the murder was perpetrated. In such case there could be no question as to defendant's guilt for it is shown by the testimony of the defendant, as well as the State's witnesses, that at the time the murders were committed the defendant was in possession of that gun. That fact is further set forth in the stipulation (R. 357) in the following language:

> "The witness identified these shells as having been fired in the shotgun which the evidence showed to have been borrowed by the defendant from Sammie Green and to have been in the possession of defendant the night Elmer Rogers and his wife were killed."

On page 12 of petitioner's brief counsel state that:

> "On the day following the murders Lyons went hunting about a half mile from where the Rogers home had been (R. 205-207)—Lyons shot twice at a rabbit and missed. He left the empty shells on the ground (R. 206)."

On such pages of the record the defendant was testifying with reference to alleged hunting on Sunday, the day of the murders. Later on cross-examination (R. 245) defendant stated that on Monday morning he went hunting in Mr. Hooks' pasture south of town. This was an entirely different direction.

THE EVIDENCE

Beginning on page 2 in the brief of petitioner appears a purported "Statement of Facts." Only a small portion of such statement is entitled to be so designated. Most of it might more properly be designated "Lyons' testimony." It blandly ignores the mass of testimony contradicting him. It even exemplifies some of the discrepancies in his testimony. For instance, near the top of page 10 they tell us it was about 10:00 or 10:30 p. m. that Lyons was taken to the warden's office at the penitentiary. Later in the brief, in endeavoring to shorten the time between the confession at Hugo and the one at McAlester (p. 14), they tell us that the confession at Hugo was made about 4:30 in the morning and the one at McAlester "some time before 11:00 o'clock on the night of the same day." Yet they ask us to believe Lyons' statement that he was questioned for about two hours by Warden Dunn and Deputy Sheriff Van Raulston, and beaten for about an hour and a half or two hours by Van Raulston.

We shall not burden this brief with any detailed discussion of the testimony as to the taking of the confession at Hugo. Beyond the fact that Lyons was questioned for some hours and that a pan of the dead people's bones was placed upon his knees and he was required to handle them, as the officers frankly admitted, the details are a matter of dispute. We have never found any reason whatever for believing the defendant's story, particularly in

view of the flagrant and very evident perjury with reference to what happened at McAlester. Under the circumstances, however, the State did not at any time offer such confession in evidence and made no reference to it until after the defendant had testified before the jury that he was forced into such confession and that in such confession he said "what they made me say and told me to say" (R. 227). He had sworn similarly with reference to the confession at McAlester and had adopted the language suggested to him by his counsel that he had answered the questions "in the way they wanted them answered" (R. 221). After this testimony with reference to the Hugo confession we sought to question him as to what he had said, for the purpose of showing that the two confessions were not the same; that he was not telling a story dictated to him by others, and that, as he later told Warden Dunn at McAlester (line 10, R. 91), he had not told the truth at Hugo. The court, however, would not permit us to cross-examine the defendant as to such statements and we made no other effort to use such confession.

With reference to the confession made at McAlester, the testimony of the defendant is summarized in the "Statement of Facts" in petitioner's brief, beginning on page 9. His claim of mistreatment was positively contradicted by the testimony of Deputy Sheriff Van Raulston, Roy Marshall, a barber, and Warden Jess Dunn. Van Raulston and Marshall took the defendant from Antlers to McAlester,

and were present at all times until the confession of defendant had been taken, transcribed and signed.

Van Raulston, stated by counsel to have been one of those present when the confession at Hugo was taken, testified that he, together with Roy Marshall, took the defendant from Antlers to McAlester and to the warden's office where the confession was made; that the defendant was not beaten or threatened by anyone (R. 82, 83, 113); that the warden told the defendant the statement he was about to make would be used against him in court; that there was no conversation about the electric chair (R. 83). The witness further testified that he was not present when the confession at Hugo was taken; that he was present in the county attorney's office for just a few minutes about nine or ten o'clock that night; that there were two or three people there questioning defendant, but that witness had no knowledge of the confession (R. 113, 114, 116). The witness was injured in a car wreck on the night of the murders and did not take much part in the investigation (R. 115, 118).

Roy Marshall testified that he was a barber; that he had no interest in the outcome of the case, but went along at Raulston's request to drive the car as Raulston had been in a wreck. Witness was present all the time until after the confession had been signed. Defendant was not beaten, struck or threatened in any manner. "Mr. Dunn asked him if he knew his rights and he said he did. He had been there before. And that the confession could

be used, and he said yes. He asked him if he wanted to make a statement and he told Mr. Dunn he did" (R. 85). The witness saw no swollen eye or other marks of violence about defendant (R. 86). On the trip to McAlester defendant was riding in the back of the car and "I think he went to sleep a part of the time" (R. 120). It was dark or about dark when they left Antlers (R. 121). It was around thirty minutes after they got to McAlester that the confession was made. Mr. Dunn talked with him a few minutes (R. 122). Mr. Dunn "asked him when he done the shooting, where he was standing and how he shot the man through a window * * *." He answered, told where the man was standing, that he had been in the corner, when he came out by the window, he showed Mr. Dunn, turned his side to the window and showed Mr. Dunn where he shot the man" (R. 124).

The most clear and convincing evidence with relation to the McAloster confession is found in the confession itself and in the testimony of Warden Jess Dunn with reference thereto. This confession is set forth in the record on pages 92 to 102, and the testimony of Mr. Dunn is found on pages 23 to 25, 90 to 92 and 102 to 112. The confession is also quoted in full in the opinion of the Criminal Court of Appeals on pages 302 to 310. Mr. Dunn's testimony before the jury is also quoted in full in the opinion of the Court on pages 311 to 323. The Court did not quote the testimony of the warden given out of the presence of

the jury. The major portion of such testimony reads as follows (R. 23, 24, 25):

Q. "When did you see him with reference to that murder?

A. He was brought into the penitentiary and into my office, I don't recall the date, or the time, but he was brought there by the then deputy sheriff.

Q. Do you know who brought him?

A. He was a deputy sheriff and there was a barber that came. I don't remember either one.

Q. Do you remember that it was Van Raulston and Roy Marshall?

A. That is who it was, Raulston and Marshall.

Q. Did you talk to the defendant?

A. Yes, sir.

Q. At that time?

A. Yes.

Q. Where did that conversation take place?

A. In the penitentiary, in my office.

Q. Who was present?

A. Raulston, Van, the deputy sheriff, and the barber from here, and the chaplain, Seals, chaplain of the penitentiary.

Q. Mark this State's Exhibit Nine. Did you have a stenographer present?

A. Yes.

Q. To take down the conversation?

A. Yes.

Q. Did you question the defendant?

A. Yes.

Q. Did he answer the questions?

A. Yes.

Q. Did the stenographer take it in your presence? [fol. 104.]

A. Yes.

Q. At your request?

A. Yes.

Q. Mr. Dunn, I hand you State's Exhibit Nine. Will you identify that?

A. That is the statement that was taken in the office, in my office in the Oklahoma State penitentiary. This is his signature that he signed, and this is his thumb print, finger and thumb print on this document.

Q. Did he sign that at your request and in your presence?

A. Yes.

Q. Did he place his thumb print on it in your presence?

A. He did.

Q. Was any force used on him?

A. Not one bit on earth.

Q. Was he made any promise?

A. He was not made any promise.

Q. Or threats?

A. No promise or threat. When they came to the penitentiary I told them to bring him to my office. I had handled this boy before.

. . . . . .

Q. Did you have him brought to your office?

A. They came to my office after they got to the penitentiary. I asked the boy did he want to

make any kind of statement, and he said, 'yes, I'll tell you all about it.' [fols. 106-110]. I went to questioning him and told the boy, I asked him was he afraid, and asked him was he afraid to talk in there. He said he was not, and he answered every question that I asked him, and I think the boy told the truth, just as it was."

We do not attempt to set out here the testimony as quoted in the opinion of the court except a single paragraph which reads as follows (R. 91):

"He and Van Raulston and a boy named Marshall came into my office along, I guess, about nine thirty in the evening, came in and sat down, and talked to the boy. I knew him before he came up there. And I asked him had he told the truth about this case, and he said he hadn't. I asked did he want to tell the truth about this case, and he said he did. I asked him did he want to make a statement. He said he did. Then I told him his rights in the case. I told him what statement he made would be used against him, and for him not to make a statement unless he voluntarily wanted to and it would be his own free will and voluntary if he made a statement. Then I asked him did he want to make a statement, and he said he did. And I asked him a few questions, then I called in my secretary and told him that I was going to take down what he said and asked him did he want to sign it. He said he did. After the statement was taken, he got up and signed those pages and put his thumb print on each page. All voluntary things, and the office was as quiet as this is now. He was as calm and cool as he is now. His treatment in my office was the treatment he has now in this court room."

A few days after this first confession was made at McAlester defendant made another statement and admission of the murder to Cap Duncan, who had been former sheriff of Choctaw County and was such sheriff at the time

of the trial, but was at the time of the crime a guard in the state penitentiary, and to Bert Crawford, who formerly lived at Fort Towson and was acquainted with defendant as well as the murdered family. Neither of these men had any previous connection with the investigation. We quote the entire record with reference to this confession. It is found on pages 124 to 126 of the record and is as follows:

Q. "State your name.

A. Cap Duncan.

Q. [fol. 238]. What position do you hold in Choctaw County?

A. Sheriff.

Q. What position did you hold last January, 940?

A. I was sergeant at the Oklahoma State penitentiary.

Q. Do you remember the occasion when the defendant was brought to the penitentiary?

A. Yes.

Q. Did you talk to him any time after he had been brought up there?

A. I did.

Q. How long had he been there when you talked to this defendant?

A. I wouldn't be positive. I would say two or three or four days.

Q. Where was he when you talked to him?

A. He was 'on high,' what we call it, about the fourth floor.

Q. Was he in a cell?

A. Yes.

Q. Who was present when you talked to him?

A. Another guard, Bert Crawford.

Q. Was anyone else present?

A. No, sir.

Q. When you had this conversation with him did you use any threats toward him?

A. I did not.

Q. Tell the jury how you happened to talk to him?

A. Mr. Crawford had once lived at Fort Towson. He knew W. D. Lyons and the Rogers family. We went to talk to him. Mr. Crawford and I went to talk to Lyons.

Q. Was anyone else in the cell with W. D. Lyons then?

A. No, sir.

Q. Did you talk to him about this murder [fols. 239-245]?

A. Yes, sir.

Q. What was said?

A. He said he and Van Bizzell killed the Rogers family.

Q. How did he say he killed them?

A. Shot them."

Cross-examination by Mr. Belden

Q. "Now, Mr. Duncan, you were a former sheriff in this county?

A. Yes, sir.

Q. And have been an officer for a long time?

A. I was an officer twelve years.

Q. And have been living here, and have been a former sheriff, how many terms? Two?

A. Yes, sir.

Q. And knew about the situation down there, and was interested in it, you knew that the confession was obtained?

A. Yes, I had heard about it. I had not seen them and didn't hear them made.

Q. And you did go back to talk to him again about it?

A. Yes, sir.

Witness excused.

By Mr. Marshall: If Your Honor please, for the sake of the record, may we have the record show that pursuant to his duty, Mr. Duncan has been in the court room the whole time and will be and that the rule does not apply. He has been with Lyons the whole time, but I think the record should show that he has been.

By the Court: I don't know whether he has been.

By Mr. Duncan: Yes, sir, I have been here all the time.

By the Court: Yes, the record may show that Mr. Duncan is the sheriff and has been in the room and was excused from the rule."

ARGUMENT

I.

It is alleged that the admission of the confessions made at McAlester was a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

In view of the petitioner's palpably false statements as to what happened at McAlester we have found no rea-

son for relying upon his story as to the proceedings at Hugo. However, for the reasons later expressed by the trial court and the Criminal Court of Appeals, we treated said confession as incompetent. We, therefore, approach the question as to the admissibility of the second confession with the premise that the Hugo confession was involuntary. It is a well established rule in Oklahoma that a confession is presumed to be voluntary and admissible in evidence, and where its admissibility is challenged by the defendant, the burden is on him to show that it was procured by such means or under such circumstances as to render it inadmissible, unless the evidence on the part of the state tends to show that fact.*

Furthermore, a confession, though obtained without warning that it might be used against him, and by persistent questioning on the part of the officers, but without deception or hope of reward, or any threat or inducement other than a remark that it would be better for him to tell the truth, is admissible as a voluntary confession.** Yet having conceded the involuntary character of the Hugo confession we have been perfectly willing to assume the consequent burden with reference to the confession made at McAlester. We shall not, therefore, engage in a discussion of the various cases cited in petitioner's brief, though counsel have made some erroneous

* Berry v. State, 4 Okla. Cr. 202, 111 Pac. 676; Cuthrey v. State, 24 Okla. Cr. 183, 216 Pac. 948.

** O'Neil v. State, 38 Okla. Cr. 391, 262 Pac. 218.

statements with reference to the decisions as well as the facts. For instance, in referring on page 19 to the case of *State* v. *Ellis*, 294 Mo. 269, also reported in 242 S. W. 952, they state that the prosecution made no effort to introduce the first confession. In fact both confessions were introduced. Nor are we concerned as to the Mississippi cases, though that court has established a rule placing a much greater burden upon the state with reference to confessions than our own court has ever expressed. In the case of *Whip* v. *State*, 143 Miss. 757, 109 So. 697, the court held that:

> "In order to make competent a confession of guilt by a defendant charged with crime, the evidence of such confession must be so strong as to exclude every reasonable doubt that it was procured from the defendant under a threat of punishment, or a promise of reward. It must exclude every reasonable doubt that the confession was not freely and voluntarily made."

But we believe that, as held by our own court, we have fully met the test with reference to the McAlester confessions and that there can be no doubt that these confessions were not only true, but that they were entirely free and voluntary.

When the defendant was brought to the penitentiary at McAlester he was returning to a place and to surroundings and a life with which he was thoroughly familiar. He had already served two terms in this prison. He had last been released on October 4, 1939 (R. 227), which was scarcely three months before. He knew Warden Dunn.

He knew the rules enforced in the penitentiary. He well knew that he would not be touched. Yet counsel ask the Court to find that Warden Dunn would sit idly by while an outsider beat a prisoner for an hour and a half or two hours until he had beaten him into a confession. They ask this Court to accept the wholly uncorroborated story of the defendant in the face of the positive testimony of Warden Dunn, Van Raulston and Marshall and the findings of the jury and the state courts. The petitioner himself made an entirely new and distinct transaction out of the McAlester confession, claiming that he denied guilt and that he was questioned for two hours and beaten for an hour and a half or two hours until finally forced into a confession. Yet counsel state in their brief, as already mentioned, that the confession was made "some time before 11:00 o'clock," though they tell us he did not reach the prison until about 10:00 or 10:30. They were trying to shorten the time between the two confessions, as they state in the same connection that the confession at Hugo was made about 4:30 in the morning. The testimony of the officers placed it between 12:00 and 2:00 o'clock.

On page 20 of their brief, counsel refer to Van Raulston, "who was present when the first confession was obtained," which was plainly untrue. On the same page they state "it is peculiarly significant that the only completely disinterested witness to this confession, the chaplain at the penitentiary, was at no time called to the witness stand by the prosecution." In other words, they would

say that Roy Marshall was interested and not to be believed, even though he was merely a private citizen who had no connection whatever with the case except to drive Van Raulston's car, at Raulston's request, because of Raulston's injury, and no accusation of any kind was made against him by the petitioner. Counsel do not mention the stenographer who took down the confession and transcribed it, but they would probably say he was not disinterested since he was an employee of the penitentiary. Had we introduced the chaplain they would have said he too was not disinterested because he too was an employee. Moreover, the defendant himself stated that he was not mistreated in the presence of the stenographer or chaplain. In view of that fact, we would see no reason for bringing the stenographer and chaplain down to Hugo. Aside from that fact, the thought would never have occurred to us that any jury or court could ever possibly consider accepting the story of the defendant in the face of the testimony of such a man as Warden Jess Dunn, even without the added testimony of Van Raulston and Marshall.

According to the testimony of the defendant it was about sundown or dark or six o'clock when he, with Raulston and Marshall, left Antlers for McAlester. While Mr. Dunn, Raulston and Marshall were rather uncertain as to the time when they arrived at McAlester, the stenographer showed that the confession was taken at eight-fifteen. This was central standard time and in January.

The official state highway map shows the distance by hard-surface road from Antlers to McAlester as 77 miles. Mr. Dunn testified that he talked with the defendant about twenty minutes before calling the stenographer. The warden already knew the general facts concerning the murders, but nothing of the details as to defendant's connection therewith or the story he had told at Hugo. Due to his knowledge of the background of the case and after this brief talk with the defendant, the warden called the stenographer and proceeded to take the confession by question and answer. It will be noted that many times the warden asked questions based on an erroneous impression as to the facts, and he was promptly corrected by the defendant. The time of departure from Antlers and the eight-fifteen hour at which the stenographer began to take the confession fit in perfectly with the distance from Antlers to McAlester and the preliminary talk between Mr. Dunn and the defendant, but they make impossible the defendant's story as to the three and a half to four hours of questioning and beating to which he claims to have been subjected.

On page 18 of their brief, counsel devote a paragraph to defendant's confession to Sheriff Duncan and Bert Crawford. They inform us "this alleged admission was made while the petitioner was still under the influence of prior intimidation, coercion and beating, which intimidation continued up to the time of the arraignment." Nobody has ever said so except counsel for petitioner. They made

no objection to Duncan's testimony, and were careful to let him alone on cross-examination. They also avoided asking the defendant any question about the confession made to Duncan. They did not attack Duncan's testimony in any way or make any request of the trial court for the exclusion of such testimony or even refer to it in their requested instructions, but they asked the Criminal Court of Appeals and now ask this Court to accept their statement, wholly unsupported, that such confession to Sheriff Duncan was involuntary and inadmissible. The statement to Duncan was made two to four days after Lyons had been placed in the penitentiary, and, therefore, must have been made about the time he was taken back to Hugo for the preliminary hearing, at which time, it will be noted, he did not plead guilty though back in the hands of officers who, it was claimed, had beaten and intimidated him. For counsel to take the position that the trial court should have excluded, on the court's own motion and without objection by counsel, the testimony of Duncan appears to us nothing less than absurd.

In the paragraph following the reference to the admission to Duncan, counsel state that there were at least twelve officers and individuals in the room during the time defendant was questioned at Hugo, when the first confession was taken, and that the prosecution only called four of these persons. The record shows that of the twelve listed by counsel on pages 5 and 6 of their brief, seven were called as witnesses by the state during the trial,

though not all of them were used at the hearing out of the presence of the jury with reference to the admission of the confession.

In the oral argument before this Court counsel for petitioner stated that Cheatwood repeatedly visited Lyons in the penitentiary during the period prior to the preliminary. There was no justification for such statement and it was contrary to all the testimony. Not even the defendant made any such claim. Cheatwood never saw him from the time he left Hugo until the day of the preliminary, and defendant's claim of mistreatment at the hands of Cheatwood on that day was positively contradicted, and seems further refuted by the fact that though he claims to have been in Cheatwood's custody on the trip to Hugo he did not enter a plea of guilty.

II.

It is contended that the State of Oklahoma denied to the petitioner equal protection and due process by failure to follow the procedure outlined in the various statutes of the state, cited by counsel, with reference to arrests, arraignment before a magistrate, allowance of counsel, preliminary hearing, etc.

As we have heretofore pointed out, counsel have departed from the terms of the stipulation. They are further attempting to raise issues not presented to the trial court and not presented to the Criminal Court of Appeals until the filing of the petition for rehearing. These issues

relate to matters occurring prior to the filing of the information in the district court, and even if there had been any merit to them they would have been waived by failure to properly present them to the trial court, and further waived by failure to preserve and present them to the Criminal Court of Appeals. Even the right to a preliminary examination, as well as irregularities therein, is waived unless properly raised before a defendant pleads to the merits of the information in the district court. *Neff* v. *State*, 39 Okla. Cr. 133, 264 Pac. 649.

Counsel make the statement that "no warrant for petitioner's arrest appears any place in the record." The same thing could be said with reference to many thousands of other records in cases which have been brought up on appeal to the Criminal Court of Appeals. These records only purport to show the proceedings before the trial court, not those before the magistrate. The latter are not incorporated in the record unless the defendant has properly raised the issue as to such preliminary proceedings and they have been made a part of the record. In felony prosecutions, unless they have been instituted by grand jury indictment, the warrant for the arrest is not issued in the district court, and the silence of the record as to the issuance of a warrant is of no significance.

Under subdivision (6) on page 25 of petitioner's brief, it is stated that "petitioner was 'arrested' by civilians on January 11, 1940." Aside from the fact that under certain conditions an arrest may be legally made

by civilians, the statement is not justified by the record. From the record it appears that Reasor Cain, who was a special officer for the Frisco railroad and who had been requested by the sheriff to work in the case (R. 129), went with "other officers" to the place where Lyons was living. "There was two or three cars of officers that went down there" (R. 127). Oscar Bearden was among them. Lyons wasn't there. "His wife said he run off." All the officers left except Cain. Oscar Bearden came back, and upon Lyons' return Bearden and Cain arrested him. On cross-examination of Cain counsel, who now assert that the arrest was made by civilians, twice referred to Bearden as "the officer with you" (R. 129).

Counsel next state that Lyons "was not officially charged with any crime until he was given a preliminary hearing before a magistrate on January 27, 1940." Aside from the fact that the record is silent upon the subject, no such issue being raised by the defendant, the statement is plainly without justification. There can be no reasonable conclusion other than that there had been a complaint filed and a setting of the preliminary hearing for the 27th of January. Certainly nothing to the contrary appears in the record.

Counsel quote various statutes of the State of Oklahoma with reference to proceedings before magistrates, as if such statutes had been completely ignored in this case. If that had been true counsel had the opportunity to have properly raised the issue and to have presented

any evidence before the trial court. They did not do so. Not only does the presumption of compliance prevail, but the record indicates that there had been every effort to protect the rights of the defendant in connection with the preliminary proceedings. It will be noted that the Criminal Court of Appeals referred to the fact that counsel evidently had in their possession a transcript of the proceedings at the preliminary hearing. This fact appears in connection with the proceedings at the trial when the county attorney sought to use the testimony given at the preliminary hearing by a physician who at the time of the trial in the district court was sick and unable to be present. These proceedings appear on pages 18 to 23. It appears from page 22 that counsel for the defendant Lyons produced and had identified as a defense exhibit a transcript of the preliminary hearing. It further affirmatively appears (R. 21) that defendant was advised of his right to counsel; that the magistrate appointed an attorney for the co-defendant and endeavored to secure two different attorneys to act for defendant Lyons. While the Constitution guarantees the right to counsel it does not guarantee counsel. In other words, it does not guarantee counsel to be furnished by the state. And in the entire record there is no evidence to warrant any assertion that the defendant was ever denied his right to counsel. On the contrary, the county judge, sitting as an examining magistrate, went beyond the limits of his duty or authority. We have no statute authorizing the appointment of

counsel for defendants in preliminary proceedings, yet the county judge endeavored to make such appointment and fully advised Lyons of his right to have an attorney. Moreover, this defendant was no novice; he had already been twice convicted and served two terms in the penitentiary. The record does not justify any assertion or assumption of imposition or denial of his constitutional rights.

Counsel make reference to and quote from a "dissenting opinion" filed in connection with this case in the lower court. There exists a situation with which this Court is not familiar and about which we do not care to comment. We merely call attention to the fact that the opinion of the Criminal Court of Appeals, which we regard as a very thorough and exhaustive one and which carefully covered all of the issues presented to the court, was unanimous and concurred in by all the judges. An extension of time was granted to counsel in which to file their petition for rehearing, and when such petition was later overruled on July 21, 1943, there was no dissent. It was not until three weeks later, August 18, 1943, that this "dissenting opinion" was filed. It is based chiefly upon an adoption and acceptance of the allegations of the petition for rehearing.

CONCLUSION

In conclusion, may we urge that the opinion of the Criminal Court of Appeals in this case presents a review of the facts, the issues and the applicable decisions and

statutes in a manner and to an extent evidencing exhaustive study and an endeavor to fully protect every right of the defendant and secure to him and all others charged with crime a fair trial and equal and unbiased justice. Certainly such opinion is entitled to great weight in the consideration of this case by this Court. It has been the effort of those representing the state in the trial court and in all the subsequent proceedings to see to it that the defendant had a fair trial. An examination of the record will disclose that not once from the beginning to the end of the trial or in the subsequent proceedings did counsel for the state ever make the slightest reference to the race or color of the defendant. Of the guilt of the defendant we do not believe there can be the slightest doubt. We believe that he has been convicted upon legal evidence and after a fair trial, and that he was most fortunate in escaping the death penalty, a fact which we are quite certain resulted from the reaction of the jury to the mistreatment admittedly given the defendant there at Hugo.

Wherefore, it is respectfully submitted that the judgment of the trial court and the decision of the Criminal Court of Appeals of the State of Oklahoma should be affirmed.

Respectfully submitted,

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